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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA, PETITIONER

v.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 16–23) is reported at 157 2d 616.

JURISDICTION

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 23). On November 19, 1946, by order of Mr. Justice Rutledge, the Government's time for filing a petition for a writ of certiorari was extended to December 22, 1946 (R. 25). The petition was filed December 17, 1946, and was granted January 20, 1947, the case being transferred to the summary

docket (R. 26). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether a defendant may be given consecutive sentences upon an indictment under Section 150 of the Criminal Code (18 U. S. C. 264) which charged, in the first count, that he caused a plate adapted for counterfeiting Government obligations to be made on or about August 25, 1934, and, in the second count, that he possessed the same plate on or about that date and thereafter with intent to use it in counterfeiting such obligations.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, ex-

cept as may be printed for the use of the United States by order of the proper officer thereof; or *whoever by any way, art, or means shall make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security;* or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; *or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation

or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both. [Italics added.]

Section 147 of the Criminal Code (18 U. S. C. 261) defines "obligation or other security of the United States" as follows:

> The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps.

The Fifth Amendment provides:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, * * *.

STATEMENT

In 1935 respondent and a co-defendant were indicted (R. 1–2) in two counts in the District Court for the District of Minnesota for violating Section 150 of the Criminal Code (18 U. S. C. 264). The first count charged (R. 1) that on or about August 25, 1934, at a certain address in Duluth, the defendants "unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States" for the printing of a specified ten dollar Federal Reserve note. The second

count charged (R. 1–2) that "on or about August 25, 1934, and thereafter," at Duluth, the defendants unlawfully had the plate in their control, custody, and possession with intent to use it in counterfeiting ten dollar Federal Reserve notes. On May 12, 1936, the defendants pleaded guilty (R. 2), and respondent was sentenced on each count to imprisonment for 15 years and to pay a fine of $5,000, the sentences to be served consecutively and to commence upon the expiration of a sentence respondent was serving in the Wisconsin State Penitentiary.[1]

In 1941 respondent filed in the District Court for the Northern District of California a petition for a writ of habeas corpus, in which he contended, *inter alia*, that the offense charged in the first count of the indictment embraced every element of the offense alleged in the second count and therefore that he had been subjected to double punishment for the offense charged in the second count. On appeal from the order discharging the writ of habeas corpus, the Circuit Court of Appeals for the Ninth Circuit held, relying on its earlier decisions, that each count charged a sep-

[1] It appears from the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171, 172 (see *infra*), that at the time the Minnesota federal sentences were imposed respondent was serving a 35-year sentence for forgery in the Wisconsin State Penitentiary. In 1939, after having served 4 years of the state sentence, he was released from state custody and surrendered to the federal authorities to serve his federal sentences.

arate punishable offense. *Michener* v. *Johnston*, 141 F. 2d 171, 174.[2]

Thereafter, on March 26, 1946, respondent filed in the convicting court the motion in the present proceeding, accompanied by a supporting brief, to vacate the sentence imposed on count 2[3] upon the ground previously urged in the district court in California, i. e., that upon the basis of the allegations of the indictment he could not be given an additional sentence under count 2 because the offense charged in that count was covered by count 1 (R. 3–5, 5–8). The motion was denied (R. 10).

On appeal to the Circuit Court of Appeals for the Eighth Circuit, the order of the district court was reversed and the cause remanded with directions to vacate the judgment in respect of the second count (R. 23). The court below, ex-

[2] The circuit court of appeals also pointed out that in any event respondent was not then entitled to be released, even though the sentence on the second count should be considered void, because he had not yet served his sentence on the first count. However, the court remanded the case to the district court for a specific finding of fact on the issue whether respondent had intelligently waived the right of assistance of counsel upon his arraignment on the indictment. The district court found that respondent did in fact intelligently waive his right in this regard, and that finding was thereafter affirmed by the circuit court of appeals. 146 F. 2d 129, certiorari denied, 324 U. S. 874.

[3] Cf. *Holiday* v. *Johnston*, 313 U. S. 342, 349. Rule 35 of the Federal Rules of Criminal Procedure provides that "The court may correct an illegal sentence at any time."

pressly recognizing that its decision was in conflict with decisions of the Circuit Court of Appeals for the Ninth Circuit (R. 21–22), held that the evidence which would sustain the first count would necessarily also sustain the second count, with the result that there would be double punishment if a consecutive sentence were permitted on the second count. It reached its conclusion in this way: Respondent, it is charged, caused the plate to be made. The person who made it was, hence, his agent, and respondent was in constructive possession of it the moment it was finished. Proof of the first count consequently proved possession in respondent. Possession is a continuing offense and is not augmented or divisible into separate offenses because it may continue for more than a day (R. 18, 22). The conceded facts involved in the offense charged in count 1 were also sufficient to show that respondent possessed the plate with intent to use it for counterfeiting, an element of the offense of possession charged in count 2. These were that respondent had to commit a crime to get possession of a plate which, on its face, disclosed its purpose to be for counterfeiting. "Proof of the possession of this plate by one who had unlawfully produced it, in connection with the character of the plate, was, unexplained,[4] not only prima facie proof of criminal intent, but convincing evidence of it. * * * It

[4] The court evidently refers to respondent's plea of guilty.

is scarcely conceivable that any other or additional facts could have been adduced in support of [the] allegation" that respondent's possession was for the purpose of counterfeiting (R. 21).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that on the facts appearing in the indictment respondent could not be given consecutive sentences for the offenses of causing to be made a plate adapted for counterfeiting Government obligations and of thereafter possessing the plate with the specific intent to use it for counterfeiting such obligations.

(2) In directing that the sentence on count 2 be vacated.

SUMMARY OF ARGUMENT

The court below held, in effect, that Section 150 of the Criminal Code does not permit a separate punishment to be imposed for the offense of possessing a plate with the intent to use it for counterfeiting Government obligations (count 2) if the possessor of the plate caused another to make it for him (count 1), or made it himself and was punished for that offense; that the offense of manufacturing includes the offense of possession and, hence, that it would be double punishment to permit an additional sentence for the latter offense. There is no basis for the holding either in the language or purpose of the statute, its legislative history, or constitutional considerations.

A. The legislative history, reviewed at length in *United States* v. *Raynor*, 302 U. S. 540, reveals that because of the increasingly serious menace of counterfeiting, which was not adequately combatted by the existing criminal sanctions against making, uttering, and passing counterfeit money, Congress, by successive enactments strengthened the Government's hand against the counterfeiter, an evolutionary process which culminated in an entire chapter of the Criminal Code in which Congress manifested the purpose of striking hard at every separable step which might in any way contribute to the evil of circulating counterfeit Government obligations.

In the second clause of Section 150, the one on which the first count is predicated, Congress was concerned alone with the act of making a plate, regardless of the purpose for which it is made or into whose hands the plate passes or how it gets there. Such a plate, simply, must not be made; it is a dangerous thing *per se* to make a plate in the likeness of one from which genuine Government obligations are printed. The offense is completed at the moment the plate is made.

But in the fourth clause, the one on which the second count is predicated, Congress dealt with a step which succeeds the manufacture of the plate. It was not at all interested in that clause in whether the possessor or someone else made the plate or caused it to be made, or whether the plate was made initially for an evil purpose. Its concern was solely with the act of possessing a

plate with the intent to use it for counterfeiting. "Whoever" possesses such a plate with the proscribed intent is punishable. No exception is made. Contrary to the holding below, it cannot matter, therefore, that the possessor of the plate himself made it or caused someone else to make it for him and was punished for the making of the plate.

B. The double-jeopardy provision does not prevent the carrying out of the Congressional purpose that the second and fourth clauses of Section 150 be regarded as defining completely distinct offenses, separately punishable. In *Albrecht* v. *United States*, 273 U. S. 1, not considered below, the provision was held to be no barrier to separate sentences for possession and sale of intoxicating liquor in violation of the National Prohibition Act, even though on the facts of the case the same liquor was involved and the defendants could not have sold without having possessed. This result was reached because Congress intended to, and did, differentiate between the offenses of possession and sale and "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction" (p. 11). The present case is indistinguishable in principle.

The decisions of this Court illustrate, we think, that no matter how closely offenses may be related, the criterion which has guided this Court,

in the application of the double-jeopardy principle, is whether the difference between the offenses is merely formal or whether each is aimed at a substantially distinct evil, as here.

The National Prohibition Act cases relied upon below were decided prior to the *Albrecht* case and are inconsistent both in rationale and result with that decision. There are, moreover, factual differences between those cases and the instant case. Thus, the possession count in this case was based upon a duration of possession not reflected in those cases.

The "included offense" doctrine upon which those decisions, as well as that below, rest can only apply where one offense is necessarily an ingredient or an incident or a part of another. It can have no application where each crime, as in the instant case, relates to an entirely distinct evil and the second offense does not come into being until after the first has been committed.

ARGUMENT

CONSECUTIVE SENTENCES MAY BE IMPOSED UNDER SECTION 150 OF THE CRIMINAL CODE AGAINST ONE WHO MAKES OR CAUSES A PLATE TO BE MADE AND THEREAFTER POSSESSES THE PLATE FOR THE PURPOSE OF COUNTERFEITING

The court below concedes that "There can be no doubt but that separate offenses might be charged and proved" under the provisions of Section 150 of the Criminal Code here involved (R. 18), and it further concedes that (R. 22) "In the

instant case, confessedly, proof that would only support the second count [the possession count] would not necessarily be sufficient to support the first [causing the plate to be made]." Notwithstanding the difference in the elements of the two offenses, it held that respondent's offense of possession of the plate with the intent to use it for counterfeiting [5] was absorbed by his offense of causing the plate to be made. The court below held, in essence, therefore, that there must be excluded from the purview of Section 150, as a separate punishable offense, the offense of possession where the possessor either makes the plate himself or causes someone else to make it for him [6] and is held criminally responsible for the

[5] Respondent's plea of guilty is, of course, an admission of the facts pleaded. *Steffler* v. *United States*, 143 F. 2d 772 (C. C. A. 7), certiorari denied, 323 U. S. 746; *Norris* v. *Hudspeth*, 114 F. 2d 1007 (C. C. A. 10).

[6] The allegations of the two counts make it evident that but one plate was involved and the court below points out in its opinion that the Government's attorney so conceded on oral argument in that court (R. 17). Also, it is a fair inference from the indictment that the plate passed immediately into the possession of respondent after it was finished and that there was no intervening possession; indeed, in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171 at 174, it is stated that the record in that case "intimates that [respondent] compelled an engraver, at the point of a pistol, to make the plate." We take it that the case must be decided on the basis of the composite factual picture presented by both counts of the indictment rather than on the assumption that if the two counts be divorced from each other some hypothetical state of facts, not indicated by the indictment as a whole, might establish

latter offense.[7] In other words, the offense of possessing a plate may be prosecuted as a completely distinct and independent offense only where the possessor takes no part in the making of the plate.[8] The court's decision, we submit, finds no warrant either in the language or purpose of the statute, its legislative history, or constitutional considerations.

(a) ***Congress intended the offenses here involved to be distinct offenses, separately punishable, even though the possessor of the plate made it himself or caused someone else to make it for him.***

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each count without presenting the problem here involved. See *In re Snow*, 120 U. S. 274, 281–282; *Ebeling* v. *Morgan*, 237 U. S. 625, 627–628, see, also, *Hans Nielsen, Petitioner*, 131 U. S. 176, 185, 186; *Morgan* v. *Devine*, 237 U. S. 632, 636, 637.

[7] Presumably the court below would allow the possessor to be convicted of possession of the plate if he were not at the same time or had not previously been convicted of making or causing the plate to be made. *Cf. Tritico* v. *United States*, 4 F. 2d 664, 665 (C. C. A. 5), cited in the opinion below (R. 20). Additionally, the court below stated (R. 19) that "in the instant case, it may be conceded that under a possible state of facts one could properly be convicted of the two offenses charged in the indictment." The court does not indicate what this "possible state of facts" is, but, of course, it excluded the case before it.

[8] While the court below does not articulate its holding precisely in this language, it is manifest, under the court's process of reasoning, that in every case in which a defendant is convicted of making or causing to be made the same plate he is also convicted of possessing, the offense of possession will necessarily be merged with the offense of making or causing the plate to be made.

In *United States* v. *Raynor*, 302 U. S. 540, the Court, in an opinion by Mr. Justice Black, undertook an extensive review of the long history of the legislation embodied in Section 150 and related sections in connection with the construction of another clause of the section. The opinion points out (pp. 543–546, 548) that for many years the federal counterfeiting statutes had merely made it offenses to make, utter and pass counterfeit money. However, in 1837, and in the period between 1860 and 1864, due to panic and war conditions, unprecedented amounts of treasury obligations were issued, and counterfeiting became an increasingly serious menace. By enactment after enactment Congress strengthened the hand of the Government against the counterfeiter, and this evolutionary process culminated in an entire chapter of the Criminal Code, entitled "Offenses against the Currency," devoted to preventing and punishing counterfeiting (35 Stat. 1115).

The range of offenses covered by this chapter makes it manifest that Congress realized that it could not successfully combat the circulation of counterfeit government obligations unless it struck hard at every separable step which might in any way contribute to the accomplishment of that evil, from the importing or the making of plates to the making and uttering of counterfeit obligations themselves. Among the seven offenses set out in Section 150 of this chapter of the Criminal Code, there are several which deal with the

initial phases of counterfeiting, such as the making of bogus plates, the possession of such plates, the possession of paper similar to that used by the Government for printing its obligations, etc. Each of the seven "closely connected companion offenses" defined in the section are, as Mr. Justice Black stated, "seven separate offenses" (*United States* v. *Raynor*, 302 U. S. at 548). Each clause is separated from the others by a semicolon; some require a specific intent; others are aimed at particular acts irrespective of intent. There is not a word to indicate that violation of one clause absolves an offender from criminal responsibility for violation of another.

In respect of the two clauses here involved, the second and fourth, it is manifest that the second, the one on which the first count is predicated, is concerned alone with the act of making a plate; anyone who makes a plate or causes or assists another to make one is punishable. Congress was not at all concerned in this clause in the purpose for which a plate is made. It might be made for an entirely innocuous purpose. Neither was it important to it whether the plate is made by or for one who thereafter possesses it, or whether it comes into the custody of the possessor in some other way. It is a dangerous thing in and of itself to make plates in the likeness of those from which genuine Government obligations are printed. Such plates, however innocent the

purpose of the maker, might get into the hands of those inclined to use them for counterfeiting. Simply, they must not be made." Hence, the precise evil at which Congress directed the second clause is solely the making of a plate and the offense is completed the moment that is accomplished.

However, the fourth clause, the one on which the second count is based, approaches one step closer to the ultimate objective of Congress, the prevention of the circulation of counterfeit Government obligations. Congress, in the fourth clause, provided a criminal penalty for "whoever" should have in his control, custody, or possession a plate in the similitude of a plate from which any genuine Government obligation has been printed "with intent to use such plate, * * * or to suffer the same to be used in forging or counterfeiting any such obligation * * *, or any part thereof." It is evident that in this clause Congress was concerned with an aspect of counterfeiting entirely distinct from that in which it was interested in the second clause. In the fourth clause it was dealing with an offense which succeeds the manufacturing of a plate, an offense which comes into being when manufacture ends and which might, and probably would, have duration. The clause provides that no one, without ex-

[*] Cf. *Kaye* v. *United States*, 177 Fed. 147, 150 (C. C. A. 7).

ception, shall have in his possession a plate which he intends to use for counterfeiting. Congress was not at all concerned with who made the plate or caused it to be made, the possessor or someone else, or with whether the plate was made originally for an innocent or an evil purpose. It was interested solely in the act of possessing a plate with the proscribed intent, regardless of how or when the possessor got the plate or from whom he got it. Consequently, it is manifest that Congress, contrary to the decision below, intended to penalize as an offense separate and apart from the offense of making or causing a plate to be made, the offense of thereafter possessing the plate for the purpose of using it for counterfeiting, irrespective of whether the possessor of the plate himself made it or procured or caused someone else to make it for him and was punished for the making of the plate.[10]

[10] The statutes pertinent to the long legislative history of Section 150 are copied, from the beginning, in the Appendix to the Government's brief (pp. 37–63) in the *Raynor* case (Nos. 146, 147, October Term, 1937). The two provisions here involved had their genesis in Section 11 of the Act of October 12, 1837, c. 2, 5 Stat. 201, 203. At that time both crimes required that they be committed with the intent that the plate should be used for counterfeiting. The penalty was imprisonment at hard labor for a term of three to ten years and a fine not exceeding $5,000 (*Raynor* Brief, pp. 42–43). The provisions remained in this form through successive enactments (*Raynor* Brief, pp. 43–47) until the Act of February 25, 1862, c. 33, sec. 7, 12 Stat. 345, 347–348, when it was provided that the intent in connection with the crime of mak-

(b) *Constitutional considerations do not preclude separate punishments for the two offenses.*

It is elementary, of course, that the power to define and prescribe the punishment for offenses against the United States resides in Congress (*Burton* v. *United States,* 202 U. S. 344, 377–378; *Morgan* v. *Devine,* 237 U. S. 632, 639). And it cannot now be doubted that Congress may, without offending the double-jeopardy provision, penalize every step which may contribute to the consummation of an evil which it has the power to punish, regardless of whether the same or different persons take the various steps, and may at the same time punish the ultimate evil itself. Thus, in *Albrecht* v. *United States,* 273 U. S. 1, to which no consideration was given in the opinion below,

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ing plates was required to be that the plates be made for some purpose other than printing notes, bonds and other obligations for the use of the United States, and that the term of permissible imprisonment be fifteen years (*Raynor* Brief, pp. 49, 50). In the Act of June 30, 1864, c. 172, sec. 11, 13 Stat. 218, 221, it was specified that either a fine or imprisonment or both could be imposed (*Raynor* Brief, pp. 53, 54). Intent in connection with the making of plates was eliminated when the legislation took its present form as Section 150 of the Criminal Code; there was also eliminated the provision that imprisonment be at hard labor (*Raynor* Brief, pp. 58–60). The Special Joint Committee on the Revision of the Laws, in reporting the section, then Section 151 (Senate Report 10, Part 1, p. 19, 60th Cong., 1st sess.) stated: "This section is broadened so as to embrace every method which may be employed in counterfeiting the obligations of the United States, and its provisions are extended so as to apply in any place under the jurisdiction of the United States."

the defendants were convicted of possession and sale of liquor. Their contention was that the liquor which they were convicted of having sold was the same liquor which they were convicted of having possessed, and as they could not have sold such liquor without having possessed it, therefore their conviction of having sold necessarily included the offense of having possessed, so that in imposing upon them separate penalties for the sale and possession the district court had subjected them to double punishment for the possession, contrary to the Fifth Amendment. This Court rejected the argument because Congress intended to, and did, create distinct offenses,[11] and "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction" (p. 11). The instant case is indistinguishable in principle. In the *Albrecht* case the defendants were convicted for participation in one step in the transaction and for participating in the completed transaction—the sale. In the present case re-

[11] Thus the Court stated (p. 11): "One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he never had possession; and one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense".

spondent was convicted for participation in two distinctive steps in the counterfeiting transaction preliminary to the accomplishment of the ultimate evil at which the legislation strikes.

This Court, in determining whether there is a difference between offenses in the application of the double-jeopardy clause, has generally applied what has become known as the "same or different evidence" test,[12] a test which if it discloses a difference will, as Mr. Justice Rutledge pointed out in his concurring opinion in *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21, usually show that, as here, the difference is substantial. But, essentially, it seems to us, the decisions in this Court which have held, in particular cases, that double-jeopardy does not exist, have come down to the proposition, whether it be expressly articulated or merely arrived at intuitively, that a separate punishment was permissible because each offense was aimed at a substantially distinct evil. And this principle has been applied no matter how closely the offenses are related, whether they are occasioned by one act or grow out of one transaction or course of conduct, whether they are motivated by one intent, or whether the same evidence in fact establishes each.

[12] Shortly stated, this test, as recited in *Carter* v. *McClaughry*, 183 U. S. 365, 395, *Gavieres* v. *United States*, 220 U. S. 338, 342, 344, and other cases, is whether the same evidence is required to sustain the offenses involved.

The principle, we think, is illustrated in the decisions which, in addition to the *Albrecht* case,[13] have rejected the double-jeopardy argument in prosecutions for insulting a public official and for disorderly conduct growing out of the same incident (*Gavieres* v. *United States*, 220 U. S. 338); for making a single sale of narcotics in violation of the order form and original stamped package provisions of the Harrison Act (*Blockburger* v. *United States*, 284 U. S. 299, 303–304); for conspiring to commit an offense and for committing the offense, even though the substantive offense may be the overt act of the conspiracy (*Carter* v. *McClaughry*, 183 U. S. 365, 394–395; *Pinkerton* v. *United States*, 328 U. S. 640, 643–644); for conduct unbecoming an officer and a gentleman and for conspiracy to defraud and the causing of fraudulent claims to be made, "although to be guilty of the latter involves being guilty of the former" (*Carter* v. *McClaughry*, 183 U. S. 365, 395); for agreeing to receive proscribed compensation and for receiving such compensa-

[13] In *King* v. *United States*, 280 U. S. 521, this Court affirmed, *per curiam*, on the authority of the *Albrecht* case, a decision of the Circuit Court of Appeals for the Ninth Circuit (31 F. 2d 17) holding that a conviction of the offense of selling morphine not in or from the original stamped package is not a bar to a subsequent prosecution for the offense of shipping morphine in interstate commerce, without having registered or paid the special tax, even though the same morphine was involved in the two cases; the two offenses being perfectly distinct as a matter of law.

tion (*Burton* v. *United States*, 202 U. S. 344, 377–378); for breaking into a post office with intent to commit larceny and for committing larceny at the post office (*Morgan* v. *Devine*, 237 U. S. 632); for cutting each of a number of mail bags, even though all were cut in the course of one transaction (*Ebeling* v. *Morgan*, 237 U. S. 625); for sales on successive days to the same purchaser of a narcotic drug not in the original stamped package (*Blockburger* v. *United States*, 284 U. S. 299, 301–303); for unauthorized sales of cocaine to three different persons on different days, as against the contention that the several offenses constituted a single continuous act inspired by the same intent (*United States* v. *Daugherty*, 269 U. S. 360, 361, 363); for passing two different counterfeit notes of the same denomination (*United States* v. *Randenbush*, 8 Pet. 288); for three murders on the same day, as to two of which the defendant was acquitted on the ground of insanity (*Hotema* v. *United States*, 186 U. S. 413, 421–422); for assaults on two individuals, even though they occurred "very near each other in one continuing attempt to defy the law" (*Flemister* v. *United States*, 207 U. S. 372, 375); for homicide, where the accused had been convicted of assault and battery before the death of the injured person (*Diaz* v. *United States*, 223 U. S. 442, 448–449); for making a false entry in the books of a bank, showing a credit, and later

making a false entry in a report of the condition of the bank, showing the same credit (*United States* v. *Adams*, 281 U. S. 202, 204–205).[14] Cases dealing specifically with the counterfeiting statutes in the lower federal courts are referred to in the footnote.[15]

The court below, to support its holding, relies principally upon a group of cases under the Na-

[14] In *Penfield Co.* v. *Securities and Exchange Commission*, No. 453, present Term, decided March 31, this Court, in a contempt proceeding, said: "When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense." (Slip opinion, p. 8.) See also *In re Chapman*, 166 U. S. 661, 672.

[15] In addition to *Michener* v. *Johnston*, 141 F. 2d 171, 174 (C. C. A. 9), holding that the instant indictment charged offenses separately punishable, see *Matthews* v. *Swope*, 111 F. 2d 697 (C. C. A. 9), which sustained consecutive sentences for making and possessing the same counterfeiting plates; *Power* v. *Squier*, 130 F. 2d 868 (C. C. A. 9), where the defendant was sentenced separately for manufacturing molds for the making of fifty-cent pieces and for possessing the molds; *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2), in which consecutive sentences were sustained for possessing and selling the same counterfeit note (see also *Ross* v. *Hudspeth*, 108 F. 2d 628 (C. C. A. 10)); *McMurtry* v. *United States*, 139 F. 2d 482 (C. C. A. 5), certiorari denied, 321 U. S. 783, which involved separate sentences for possessing and passing an altered obligation of the United States; and *Reger* v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10), certiorari denied, 308 U. S. 549, which involved separate sentences for possessing counterfeit coins and passing them; see also *Curran* v. *Sanford*, 145 F. 2d 229 (C. C. A. 10).

tional Prohibition Act which held that one could not be punished for manufacturing liquor and at the same time also be punished for possessing the equipment to manufacture the liquor or for possessing the liquor manufactured (R. 20).[16] The theory of these cases was, apparently, that since proof of the offense of manufacturing necessarily established also, in the particular cases, the offense of possessing distillery apparatus or of

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[16] *Patrilo* v. *United States*, 7 F. 2d 804 (C. C. A. 8); *Tritico* v. *United States*, 4 F. 2d 664, 665 (C. C. A. 5); *Morgan* v. *United States*, 294 Fed. 82, 84 (C. C. A. 4); *Reynolds* v. *United States*, 280 Fed. 1 (C. C. A. 6), modified as to another point, 282 Fed. 256.

Neither *Murphy* v. *United States*, 285 Fed. 801 (C. C. A. 7), nor *Stevens* v. *McClaughry*, 207 Fed. 18 (C. C. A. 8), cited by the court below (R. 20), involved analogous problems. The *Murphy* case was concerned with the splitting of a single conspiracy (p. 817). The *Stevens* case is an early decision (1913) rendered prior to the clarification of the pertinent principles afforded by numerous later decisions of this Court. If sound, it involved the problem whether but one offense was committed by a single act simultaneously offending against two closely integrated statutory provisions; it was not concerned with successive steps contributing to the accomplishment of an over-all evil Congress sought to prevent, as here. As to *Cain* v. *United States*, 19 F. 2d 472 (C. C. A. 8), from which the court below quotes (R. 19), see the analogous case of *King* v. *United States*, 31 F. 2d 17, 19, in which the Circuit Court of Appeals for the Ninth Circuit expresses its disagreement with the conclusion in the *Cain* case, citing the *Albrecht* decision. The *King* case, as indicated (footnote 13, *supra*, p. 22) was affirmed, *per curiam*, by this Court on the authority of the *Albrecht* case (280 U. S. 521).

possessing liquor,[17] the latter offenses were embodied or included in the offense of manufacture and therefore it would be double punishment to separately sentence for these offenses. Rightly understood, these decisions are, we submit, perversions of the "included offense" doctrine. They were all decided prior to the decision of this Court in the *Albrecht* case on January 3, 1927, where, in connection with the National Prohibition Act, this Court reemphasized the principle which, at least, was implicit in some of its prior decisions,[18] that, as has been indicated, the Constitution does not prevent "Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit * * *" (273 U. S. at 11).

The cases are, we believe, inconsistent with the *Albrecht* decision because the courts which decided them failed, through disregard of the principle stated, to give any consideration to the problem whether Congress meant to punish each of the so-called "included" offenses as separate steps leading to the consummation of an evil as to which it could

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[17] The factual situation in the *Patrilo* and *Tritico* cases was that on a particular day Government agents raided a place in which they found an illicit still in operation. This would seem also to have been the situation in the *Reynolds* and *Morgan* cases.

[18] Particularly *Burton* v. *United States*, 202 U. S. 344, 377.

impose penal sanctions and because, if those courts had given consideration to the principle of the *Albrecht* case, they could, we believe, have reached no other result in connection with the punishability of the Prohibition Act offenses involved than this Court reached in respect of the Albrecht's Prohibition Act offenses. It may also be pointed out that there was in the *Albrecht* case no more evidence of duration of possession of the liquor involved than there was in respect of the liquor with which the cases relied upon below was concerned.[19]

Moreover, while we do not regard the difference as controlling, there is, at least, this factual difference between the instant case and the liquor cases cited by the circuit court of appeals. In the instant case the second count charged, and the respondent admitted by his plea of guilty, a possession which continued for some time after the act of manufacture. The charge was that on or about August 25, 1934, the day of manufacture, "and thereafter" respondent possessed the plate. There was, of course, no similar charge of posses-

[19] The evidence in the Albrecht case was that on particular days informers went into the Albrecht's establishment and purchased liquor (R. 26–38, No. 9, October Term, 1926). On the basis of this evidence a separate count of possession and a separate count of sale was framed as to each sale (R. 1–5).

sion in relation to manufacture in the liquor cases. Cf. footnote 17, *supra*, p. 26.[20]

The "included offense" doctrine, properly applied,[21] does have an important place in relation to the double-jeopardy protection in so far as it serves to prevent a second trial or double punishment for a crime which is, essentially, merely an ingredient or an incident or part of another crime. This is illustrated by such decisions of this Court as those in *Grafton* v. *United States*, 206 U. S. 333, and *Hans Nielsen, Petitioner*, 131 U. S. 176. In the *Grafton* case this Court held that a soldier who had been acquitted of homicide by a court-martial could not be tried in a civil court in the Philip-

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[20] This distinction is, of course, without significance if, as we submit, Congress intended to make possesion of distilling apparatus and liquor offenses independent of manufacture, just as it likewise intended, we contend, in connection with the manufacture and possession of bogus plates. In that aspect it cannot matter that the possession was of little or longer duration. Our argument would be the same if, for example, the officers had arrested respondent immediately after the engraver made the plate and turned it over to him, provided, of course, it could be shown that he possessed the plate with intent to use it for counterfeiting. Cf. *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321, 323 (C. C. A. 2). The court below also regarded the duration of the possession as of no real significance, for it states in its opinion that it accepted the argument of respondent that the offense of possession was "not augmented because it [possession] may continue for more than a day." (R. 18).

[21] See the observations of Mr. Justice Rutledge in the *Buckley* case, *supra* (128 F. 2d at 21–22).

pines for assassination (murder) since the former offense was included in the latter, and if he were not guilty of manslaughter he could not be guilty of manslaughter under circumstances of aggravation enlarging it into murder. And in the *Nielsen* case this Court ruled that a defendant could not be convicted of unlawful cohabitation and thereafter be also convicted for an act of adultery committed during the cohabitation, since the adultery "was an incident and part of the unlawful cohabitation" (pp. 186–187).[22] But the "included offense" doctrine can certainly have no application where, as here, the second crime is not at all part and parcel of the first crime, but relates to an entirely distinct and independent evil, the second crime not coming into being until the completion of the first.

We do not, of course, contend that just because offenses substantially identical are couched in dif-

[22] This Court in its opinion quotes from authorities giving other illustrations of the same principles. 131 U. S. at 187–190. See, also, e. g., *United States* v. *Wilson*, 7 Pet. 150, 160; *Diaz* v. *United States*, 223 U. S. 442, 449, where the Court stated that all that could be claimed by an accused who had been convicted of assault and battery and later, when the assaulted person died, was tried for homicide, was that the jeopardy on the assault and battery charge "protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done" under a Philippine statute.

ferent language or there are other insignificant differences between them, the double-jeopardy barrier is hurdled. As Mr. Justice Rutledge pointed out in the *Buckley* case (128 F. 2d at 21), "in some instances legislative refinement has defined generically indentical offenses with narrow differences in intent or in the means or methods of perpetration, e. g., assault with various specific intents and with variously specified weapons. Some of these differences are substantial, others too slender for, in effect, nullifying the constitutional protection against double jeopardy." Cf. *Crain* v. *United States*, 162 U. S. 625, 636. Even if there be room for a difference of opinion as to individual cases, the decisions of this Court, as a whole, disclose that the criterion which has guided it in the application of the double-jeopardy principle, is whether the difference between the offenses is merely formal or substantial. Compare the group of decisions cited at pp. 22–24, *supra*, with such decisions as the *Grafton* and *Nielsen* decisions, *supra*; *United States* v. *Nickerson*, 17 How. 204, holding that a second charge of perjury would not lie where the defendant was acquitted of a prior perjury charge in which the evidence necessary to sustain the second perjurious act might have been given; *In re Snow*, 120 U. S. 274, deciding that the continuing crime of unlawful cohabitation could not

be carved into several periods for the purpose of maintaining separate prosecutions and increasing the punishment; and *United States* v. *Adams*, 281 U. S. 202, 204, holding that two entries on a bank's books referring to the same transaction, based upon the same draft and which were the correlated means of accomplishing a single fraud, were not independently punishable as separate offenses.

The instant case, clearly, does not fall within any of the categories in which this Court has held the double-jeopardy clause a barrier to another prosecution. The evil at which the statutory provision involved in the first count was directed is solely the making or causing to be made of a plate adapted for counterfeiting Government obligations, regardless of the purpose for which it is actually made or into whose possession it may come. The evil at which the statutory provision involved in the second count was aimed is solely a specialized type of possession of a bogus plate after it is made and after the offense of manufacturing has been consummated, a possession with the specific intent to use the plate for counterfeiting.

CONCLUSION

For the reasons indicated, we respectfully submit that the judgment of the circuit court of

appeals should be reversed and that of the district court affirmed.[23]

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[23] While respondent's sentence was severe, the maximum punishment of 15 years' imprisonment and a fine of $5,000 being imposed on each count, the trial judge undoubtedly took into consideration the fact, of which presumably he had knowledge, that respondent's crimes resulted from his forcing an engraver at the point of a gun to make the plate, and that by pleading guilty to the federal indictment it was likely that he would escape service, in part at least, of the 35-year sentence for forgery imposed by the Wisconsin state court. It turned out that he only served four years of that sentence. See footnote 1, *supra*, p. 6. There may also have been other factors which motivated the severity of the sentence, a matter which was, of course, within the discretion of the trial judge.

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